One possible solution to the problems discussed in Part I is developing a sector-based collective agreement and extending it to all employees in the industry. This would increase workers' bargaining power since it avoids competition between employers on certain workers' rights issues, stipulated in the sectoral agreement; it would overcome the instability of the bargaining parties since a change in subcontractor will become irrelevant; and it would eliminate the problem of identifying the bargaining unit since all employees in the sector will be covered. However, sectoral agreements and extension orders are declining worldwide, and when in place tend to be less beneficial to the workers than enterprise bargaining.[61]

A second alternative is to recognize that the lead company is in fact a joint employer with the subcontractor, and as such is both responsible for any violations of the subcontracted workers' freedom of association, as well as required to be part of negotiations and a side to an eventual agreement. This may be the path paved in the United States by the NLRB decision discussed above, which adopted an "indirect control" test for determination of joint employer status, though the exact implications of this ruling for subcontracting are still far from clear.[62] While the growing responsibility assigned to lead companies in case law and new legislation in many countries recognizes the responsibility of

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companies, see Guy Davidov, *Indirect Employment: Should Lead Companies be Liable*?, 37 Comp. Lab. L. & Pol'y J. 5, 19-32 (2015).

61 OECD, OECD Employment Outlook 2004, at 130 (2004), http://www.oecd.org/employment/emp/34846881.pdf; Richard Freeman & Robert Gibbons, *Getting Together and Breaking Apart: The Decline of Centralized Collective Bargaining Dirk*, *in* Differences and Changes in Wage Structures 345, 346 (Richard B. Freeman & Lawrence F. Katz eds., 1995); Harry C. Katz, *The Decentralization of Collective Bargaining: A Literature Review and Comparative Analysis*, 47 Indus. & Lab. Rel. Rev. 3, 12 (1993); Dirk Antonzyck et al., *Rising Wage Inequality: The Decline of Collective Bargaining, and the Gender Wage Gap* (IZA Discussion Paper no. 4911, 2010), http://ftp.iza.org/dp4911.pdf.

62 Case 32-RC-109684, Browning-Ferris Indus. of Cal., Inc., 362 NLBR No. 186 (Aug. 27, 2015). For an analysis of the decision, see Catherine Fisk, *Guest Post: N.L.R.B.'s Browning-Ferris Decision Could Reshape Contract and Franchise Labor*, Onlabor: Workers, Unions, and Politics (Aug. 28, 2015), http://onlabor.org/2015/08/28/guest-post-n-l-r-b-s-browning-ferris-decision-could-reshape-contract-and-franchise-labor/. Note that the Browning decision significantly extends the logic of the position taken by the NLRB in the McDonalds case. *See* Case 32-RC-109684, *Browning-Ferris Indus.* The NLRB's McDonalds ruling extended responsibility to the lead company, when the franchisee violated the workers freedom of association. Such a ruling was important but still puts no obligation on the lead company to take responsibility for its role in shaping subcontracted workers' working conditions. The Browning decision is the first

lead companies to protect the minimum rights of subcontracted workers, they so far do not *require* lead companies to be a party to collective bargaining.[63] The joint employer doctrine and legislation that regulates subcontracting and expands lead company responsibility towards subcontracted labor[64] mostly regard the lead company as responsible for making sure that the subcontractor protects the workers' *minimum* rights and, under certain conditions, fulfills its obligations towards the workers, if the subcontractor has failed to do so. They usually do not create independent duties that stem from the lead company's role in the employment of subcontracted labor, or extend obligations that stem from the lead companies' on-employment practices and collective agreements to the subcontracted labor. Such an extension of the obligations of the lead company towards subcontracted labor will only happen if the lead company is found to be the *de jure* employer of the workers.[65]

A third transformation in labor law that may assist subcontracted labor unionization efforts is attaching the collective agreement to the lead company rather than to the subcontractor. This reform could guarantee the stability of the contracting parties, since terminating a contract with the subcontractor would not invalidate the collective agreement. This solution causes various problems since it obligates any subcontractor the lead company contracts with to assume the collective agreement of its predecessor. This method of

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to signal an expansive view of the lead company's responsibility even to matters on which it has only indirect control.

63 Davidov, *supra* note 18.

64 To be clear, this category of legislation does not see the lead company as a joint employer. Rather, it seeks to incentivize lead companies to guarantee that subcontractors are in compliance with minimum protective employment laws. The legislation traditionally places direct responsibility on the lead company only in cases of employment law violations by the subcontractor.

65 One example is Israeli legislation, which adopted a solution common to that of some other postindustrial economies that attempted to tackle this. The legislation, which regulates only subcontracting in the cleaning and security sectors, places the responsibility for workers' minimum rights, as guaranteed by protective employment legislation, on the lead company only when the subcontractor fails to provide those minimum rights himself. *See* Act to Improve the Enforcement of Labor Laws 5772-2011, 2326 SH 62 (Isr.). For a discussion of this legislation, see Guy Davidov, *Special Protection for Cleaners: A Case of Justified Selectivity?*, 36 Comp. Lab. L. & Pol'y J. 219, 228-34 (2015); and Mundlak, *supra* note 9. For a discussion of similar legislative reforms in relation to subcontracted labor in Latin America, particularly Chile, Uruguay, and Mexico, see Graciela Bensusán, *Labour Law, Inclusive Development and Equality in Latin America*, *in* Labour Law and Development (Shelley Marshall & Colin Fenwick eds., forthcoming 2016).

continuity of coverage has been adopted in certain circumstances under the EU directive regarding the safeguarding of employees' rights in the event of transfers of undertakings. This directive had in mind first and foremost the sale or transfer of an operating business to a new owner, and as a result its application to subcontracting is often partial and incomplete.[66] Until such solutions are tailored to address subcontracting situations, the lead company's ability to terminate the contract with the unionized subcontractor remains a *de facto* obstacle to effective collective action by unionized labor.

A fourth, highly watered down alternative, could be the removal of the ban on secondary boycott, in jurisdictions in which it exists, in relation to the lead company in subcontracting situations. This would relatively minimally expose the lead company to union activity since then unions would be able to pressure lead companies through picketing and direct interaction, but lead companies would still have no legal obligation to bargain collectively with a representative of their employees. An example of the effect of relaxing this restriction can be found in the U.S. construction industry, where legislation excludes from the general prohibition on secondary boycott agreements in the construction industry aimed at secondary objectives. As a result, unions in the construction industry can, and regularly do, agree with lead companies to restrict subcontracting at the job site to firms employing union workers.[67]

A fifth alternative is to rethink the definition of the bargaining unit in a subcontracting situation to include an inclusive option that combines the lead company's workers with the subcontracted labor. Under such an understanding of the bargaining unit, subcontractors would be covered by existing collective agreements and enjoy the representation by the union *vis-à-vis* the employer. In nonunionized workplaces, unionization drives would have to include both core workers and subcontracted workers, thus increasing the chances that the subcontracted workers' working standards and other concerns will be addressed in labor negotiations and in a resulting collective agreement.

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66 Council Directive 2001/23 of 12 March 2001 on the Approximation of the Laws of the Member States Relating to the Safeguarding of Employees' Rights in the Event of Transfers of Undertakings, Businesses or Parts of Undertakings or Businesses, 2001 O.J. (L 82) (EC), http://europa.eu/legislation_summaries/employment_and_social_policy/employment_rights_and_work_organisation/c11330_en.htm.

67 29 U.S.C. § 158(e) (2010) (section 8(e) of the National Labor Relations Act). *See, e.g.*, Richard Bock, *Secondary Boycotts: Understanding NLRB Interpretations of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. Pa. J. Lab. & Emp. L. 905, 916 (2005); Michael Dreeben, *Hot Cargo Agreements in the Construction Industry: Restraints on Subcontracting Under the Proviso to Section 8(e)*, 30 Duke L.J. 141 (1981).

Here again myriad complications may result. Namely, recognizing a lead company as an employer for the purpose of collective bargaining, and for that purpose alone, is problematic when the lead company has only limited and partial control over the subcontractors' employment practices. Furthermore, lead companies often resort to subcontracting to ensure greater flexibility in hiring, retention and cost, in relation to part of the functions carried out in their business. Including subcontracted labor in the core bargaining unit will most likely introduce rigidity where employers seek flexibility. Such complications may impact the contractual relationship between the lead company and the subcontractor and make fuzzier the delineation of responsibilities between them.

A sixth option is the creation of a mechanism that encourages (or requires in certain circumstances) multi-employer bargaining in industries characterized by a multitude of small subcontractors, who closely compete with each other. However, there is a valid concern that such agreements, especially in low-skill labor sectors, may produce meager advances for the workers.[68] At least, in the Israeli case, it appears that legislation directly seeking to regulate labor sectors characterized by subcontracting and rampant workers' rights violations managed to achieve more than collective agreements did.[69] This example as well as examples from the unionization of subcontracted call center workers in Germany[70] remind us that some of the responsibility for the low unionization rates among subcontractors lies with trade unions, which at times benefit from

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68 See the Israeli example of sector-wide agreements in the temporary agency sector. Collective Agreement 7019/2007 on the Employment of Workers Through Temporary Work Agencies in the Private Sector (Feb. 16, 2004) (Isr.), extended by the Minister of Labor (YH — Government Records 5326, Sept. 1, 2004) (Isr.).

69 *See* Act to Improve the Enforcement of Labor Laws, 2326 SH 62; Act on the Employment of Workers through Temporary Work Agencies, 5756-1996, SH No. 1578 (Isr.); Law on Employment of Workers by Service Contractors in Security and Cleaning in Public Bodies, 5772-2013, SH No. 2406 (Isr.). Note, however, that the latter legislation was complemented by further improvement through collective agreements. *See* Collective Agreement for the Security Sector 7029/2014 (July 22, 2014), extended on Oct. 2, 2014 (YP 6899, Oct. 26, 2014); Collective Agreement for the Cleaning sector 7035/2013, extended on Feb. 5, 2014 (YP 6759, Feb. 19, 2014). For a detailed discussion of this dynamic, see Mundlak, *supra* note 9.

70 Eran Golan, *Social Change in the Shadow of the Tender Culture, Labor Commodification and Judicial Deprivation*, 3 Ma'asei Mishpat [Tel Aviv U. J.L. & Soc. Change] 201, 203-04, 209-10, 215-17 (2010) (Isr.); Hajo Holst, *The Political Economy of Trade Union Strategies in Austria and Germany: The Case of Call Centres*, 14 Eur. J. Indus. Rel. 25, 32, 34 (2008).

the existence of subcontracted labor to stabilize the unionized labor force, and tend to invest less in their organization.

While all of these strategies provide some improvement on existing labor law, none of them is sufficient to solve the conundrum of the unionization of subcontracted labor. I would like to suggest that the most promising path would require a sharp departure from existing models of collective bargaining — a shift from bilateral to multilateral collective bargaining. In order to guarantee subcontracted labor's rights to effective collective bargaining, the lead company needs to be rethought of, not as merely a neutral party but as a joint employer in a thick sense. Unless the threat of workers' collective action is an effective threat to the lead company (the brand), as well as the subcontractor (or franchisee), collective bargaining and collective action will be almost meaningless. To this end, the bargaining model needs to be reimagined as a multilateral (lead company, employer and union) model, rather than the current bilateral (employer and union) model, in order to guarantee that the lead company will sit at the bargaining table. The lead company needs to be more than a residual bearer of obligations, asked to step in when the subcontractor fails to fulfil its minimum obligations, but reconceived as a party to collective bargaining and to an eventual collective agreement with direct obligations under labor law. Such a development may cause various complications to the lead company, including ones that may make subcontracting a less appealing option. A shift to multilateral collective bargaining may not necessarily be realistically achievable under the current neoliberal political climate in most jurisdictions, pushing for de-regulation, labor market flexibility, and reduced employer obligations, all in the name of efficiency and promoting "free markets." Yet, this alternative is worth considering if not for its feasibility, then in order to exemplify the ways in which current labor law is irresponsive to the main barriers to unionization that subcontracted labor faces.

A recent innovative attempt by a union to involve lead companies in collective agreements occurred in the Netherlands in relation to the cleaning sector. In this Dutch campaign, the Allied Industry, Food, Services and Transport Union (FNV Bondgenoten), reached an agreement with lead companies in relation to the working conditions of subcontracted cleaners.[71] Realizing the significant power of lead companies in determining the cleaners' working conditions, the FNV began a campaign to encourage lead companies to sign a code of

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71 Marianne Grünell, *Cleaners Win Pay Increase Following Strike Action*, Eur. Observatory of Working Life (May 31, 2010), http://46.105.61.53/observatories/eurwork/articles/industrial-relations-other/cleaners-win-pay-increase-following-strike-action.

responsible market conduct, in which they commit to protecting the cleaning workers' rights. The provisions in the code of conduct are negotiated in a roundtable dialogue between unions, employers (subcontractors), workers, lead companies (customers) and the government. Once signed, the code is then included as an appendix to the sectoral collective agreement between the union and the cleaning companies (the subcontractors). The campaign was extended to the catering and security sectors, and as of the time of publication of this Article had been signed by 800 lead employers in these sectors.[72] This highly innovative structure seems to be reliant on the commitment to social dialogue in the Dutch labor market, and on the continued existence of sector-wide collective agreements in these sectors. While this innovation is based on "soft law" methods of voluntary action taken by corporations, it is uniquely promising because of the close involvement of a union. The inclusion of the code of conduct as an appendix to collective agreements offers the potential for more effective monitoring and enforcement mechanisms than with traditional voluntary codes of conduct. Such a legal innovation might be more difficult to implement in legal contexts that do not share the Netherlands' corporatist tradition. Regardless, even this highly innovative approach does not lead to a transformation in the basic structures of collective bargaining that obligate lead companies to take part in collective bargaining, but rather depends on their goodwill (and on the union's power to create such "goodwill") to sign the code of conduct.[73]

III. Conclusion — The Role of Law?

Even if some of the more minimal above strategies were to be adopted — which may be meaningful and in some cases quite effective — it remains questionable whether legal responses that do not significantly reimagine the structure of collective bargaining into a multi-lateral structure can *solve* the wide violations of workers' rights in multilayered contracting arrangements. Violations of workers' rights and barriers to unionization posed by subcontracted labor appear to be particularly acute in markets with an oversupply of labor, where there are abundant low-skilled workers competing for jobs despite substandard working conditions and low wages, as well as an oversupply of

72 The FNV website is dedicated to the code of conduct campaign. *See* Federatie Nederlandse Vakbeweging, http://www.codeverantwoordelijkmarktgedrag.nl/home/ (last visited June 30, 2015).

73 Guy Mundlak & Issi Rosen Tzvi, *Signaling Virtue? A Comparison of Corporate Codes in the Fields of Labor and Environment*, 12 Theoretical Inquiries L. 603 (2011).

subcontractors competing with each other over contracts with powerful lead companies.[74] The problem of oversupply of labor does not manifest itself only in subcontracting, but in developed economies subcontracted labor may be an important labor market manifestation of such oversupply. As a result, legal rules may provide a temporary solution but will not solve the problem of oversupply of labor altogether. Consequently, the reach of law may be limited in putting an end to the violation of workers' rights that are endemic in many current subcontracting arrangements. Even after the legal regime responds to the problems posed by subcontracting, other forms of nontraditional employment — distancing lead companies from the people who provide crucial services to them — may emerge.[75]

This became evident in Israeli law when in order to eliminate the long-term employment of temporary agency workers in substandard working conditions, the legislature passed the Act on the Employment of Workers Through Temporary Work Agencies.[76] The law, and its amendments, limited the employment of temporary workers to nine months, after which the workers are considered the lead company's employees, and required equalizing temporary workers' working conditions to those of permanent workers. The law had a strong impact on the Israeli labor market and significantly reduced — in fact, practically eliminated — the scope of long-term employment of temporary workers. However, the response in some sectors — particularly cleaning and security — was the "rebranding" of companies as subcontractors. As a result, now the same problematic patterns appear in the form of subcontracted labor. Recent legislation trying to improve the working conditions of those workers appears to hold some promise of guaranteeing workers' minimum rights, but it is not meant to be a path towards enabling workers' unionization.[77]

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74 Daniel Alpert, The Age of Oversupply: Overcoming the Greatest Challenge of the Global Economy 125-26 (2013).

75 The rise of the "sharing economy" — mostly evident now in the ride sharing company Uber — is an example of such challenges to traditional employment law classifications. *See* Robert Sprague, *Worker (Mis)Classification in the Sharing Economy: Square Pegs Trying to Fit in Round Holes*, 31 ABA J. Lab. & Emp. L. (forthcoming 2015).

76 Act on the Employment of Workers Through Temporary Work Agencies, 5756-1996, SH No. 1578 (Isr.). See in particular sections 12(A) and 13. For a detailed description and analysis of the Israeli regulatory experience in relation to subcontracting, see Mundlak, *supra* note 9; and Davidov, *supra* note 60, at 9-18.

77 *See* Act to Improve the Enforcement of Labor Laws 5772-2011, 2326 SH 62 (2011) (Isr.); Employment of Employee by Service Contractors in Cleaning and Security Fields of Public Entities, 5772-2013, SH No. 2406 (Isr.). For a detailed

Moreover, in other labor sectors in Israel, and in some other jurisdictions, attempts to enhance the labor and employment rights of all workers, and of subcontracted labor, were met with the growth of independent contractors as another form of workers' rights evasion.[78] For example, one prediction in the United States suggests that by 2020 over forty percent of the U.S. workforce will be unprotected by labor law for this reason.[79] This trend, much like subcontracting, calls for a significant transformation of labor law, in order to maintain its relevance to the contractual realities of the labor market.[80]

This tale of cyclical transformation — regulation and/or unionization, and employer reaction — reminds us that the relationship between law and labor is a dynamic one, in which permanent solutions are elusive. Lobbying for a better fit between labor law and labor market realities to guarantee subcontracted workers' freedom of association, if successful, will have to be followed by equally powerful organizing campaigns in which unions will struggle to ensure enforcement and implementation. Furthermore, success may lead to backlash, which can manifest itself in a multitude of ways: employers' attempts to identify and make use of loopholes, takeover of the agency in charge of rulemaking and implementation, securing the nominations of pro-capital judges, or attempts to dismantle tribunals and courts that are seen as pro-union. It may very well be that due to changing market dynamics, employer counterstrategies, as well as inter-union competition, certain laws that are helpful at one moment in time may prove to be a barrier in later stages of the cycle. Accordingly, "good labor law" cannot necessarily provide a once-and-for-all solution.

The relationship between labor lawyering and the labor movement, in this context and many others, is better thought of as a cycle of law reform rather than a process of linear progress towards a better future. As Jennifer Gordon noted, the tools provided by good labor law should not be thought of as a jackhammer but rather

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description of these developments in Israeli employment law, see Mundlak, *supra* note 9.

78 For a general discussion of the problems of workers' rights evasion and employer power to restructure work into non-employment forms, see Noah Zatz, *Beyond Misclassification: Tackling the Independent Contractor Problem without Redefining Employment*, 26 ABA J. Lab. & Emp. L. 279, 283 (2011).

79 Intuit, Intuit 2020 Report: Twenty Trends That Will Shape the Next Decade 21 (2010), http://http-download.intuit.com/http.intuit/CMO/intuit/futureofsmallbusiness/intuit_2020_report.pdf.

80 Dubal, *supra* note 10.

> more like a pick, moving the process of change-making incrementally along much as the ice-climber stakes out a hold to pull herself up to the next ledge. Falls are inevitable. It is not always clear which way is up. There is no one point at which victory is declared and the climb is over.[81]

This does not mean that it is not worth the fight; it just requires an understanding that under advanced capitalism, the struggle for a more egalitarian distribution between workers and employers cannot be thought of in terms of "once and for all" solutions, but rather requires frequent reconfiguration and recalibration of unions, collective bargaining and other labor market institutions.[82]

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81 Gordon, *supra* note 33, at 72.

82 Kathleen Thelen, Varieties of Liberalization and the New Politics of Social Solidarity 1-5, 195-207 (2014).